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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 104

THE CUDAHY PACKING COMPANY, PETITIONER

v.

RECONSTRUCTION FINANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The Emergency Court of Appeals wrote no opinion. Its *per curiam* judgment dismissing the complaint (R. 120) is not reported.

JURISDICTION

The judgment of the Emergency Court of Appeals was entered on May 8, 1951 (R. 120). The petition for a writ of certiorari was filed on June 7, 1951. The jurisdiction of this Court is invoked under Section 204(d) of the Emergency Price Con-

trol Act of 1942, as amended (56 Stat. 23, 31, 50 U.S.C. App. 924(d), making applicable Section 240 of the Judicial Code, as amended (now 28 U.S.C. 1254).

QUESTION PRESENTED

Whether the Emergency Court of Appeals, on the authority of its prior decision in *Wm. Schluderberg-T. J. Kurdle Co.* v. *Reconstruction Finance Corporation,* 169 F. 2d 419, certiorari denied, 335 U.S. 846, properly dismissed the complaint, which challenged the legality of respondent's refusal to pay subsidies on meat which was produced from livestock slaughtered while price controls were in effect but which was sold after such controls were removed.

STATUTES, REGULATIONS AND DIRECTIVES INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended (50 U.S.C. App. 901 *et seq.*) and of the controlling regulations and directives are set forth in the Appendix, *infra,* pp. 13-20.

STATEMENT

This suit was instituted by a complaint filed January 29, 1951, in the United States Emergency Court of Appeals, seeking review of respondent's denial of petitioner's subsidy claims[1] for meat

[1] Petitioner filed subsidy claims for the period from September 1, 1946, to October 14, 1946, in the aggregate amount of $521,927.83. Payments have been made by respondent in the aggregate amount of $482,563.92, representing subsidies for meat slaughtered and sold by petitioner during the above period. Petitioner claims an additional $39,363.91 as sub-

slaughtered from September 1 through October 14, 1946, but remaining in petitioner's terminal inventory for sale at uncontrolled prices after the end of meat price controls on October 15, 1946 (R. 1-5).

The genesis of this suit is substantially as follows: The basic authority for institution of subsidy payment programs is found in Section 2(e) of the Emergency Price Control Act of 1942 (50 U.S.C. App. 902(e)), Appendix, *infra*, pp. 13-14. Such subsidy payments were found necessary in respect of meat products in June 1943. At that time, in order to implement the President's hold-the-line policy (E.O. 9328, 8 F.R. 4681), the Office of Price Administration reduced the maximum permissible selling prices on meat products approximately 10 per cent.[2] This reduction was compensated for by the meat subsidy program put into effect as of June 7, 1943, by Regulation No. 3 of the Defense Supplies Corporation (8 F.R. 10826, 10829).[3] By the autumn of 1943, live cattle prices were still rising, despite the imposition of wholesale and retail ceilings and of rationing and the pay-

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sidies due for meat slaughtered during the above period but on hand as inventories at October 14, 1946, and sold on the uncontrolled market after October 14, 1946.

[2] Amendment No. 15, Revised Maximum Price Regulation 169, 8 F.R. 7675; Amendment No. 5, Revised Maximum Price Regulation 148, 8 F.R. 7671; Amendment No. 4, Revised Maximum Price Regulation 239, 8 F.R. 7679.

[3] The Defense Supplies Corporation, a corporation organized under Section 5b of the Reconstruction Finance Corporation Act (15 U.S.C. 606b) and therefore qualified to pay subsidies under Section 2(e) of the Emergency Price Control Act of 1942 (50 U.S.C. App. 902(e)) on meat products defined by the President to be strategic and critical materials, was directed

ment of the meat subsidy. By a directive dated October 25, 1943, the Director of the Office of Economic Stabilization declared that the stabilization and production programs required the maintenance of live cattle prices within certain ranges specified, and that subsidies paid to slaughterers should be reduced by the net amount by which live cattle costs fell short of or exceeded such range prices (8 F.R. 14641). Upon the dissolution of the Defense Supplies Corporation on July 1, 1945,[4] Regulation No. 3, as subsequently amended and revised, was taken over by respondent (Amendment No. 6, Regulation No. 3, 10 F.R. 11155). Regulation No. 3 continued in effect until June 30, 1946,[5] when, as a result of the termination of the Emergency Price Control Act of 1942, price controls lapsed and the authority to continue subsidy programs, including that set up by Regulation No. 3, expired (12 F.R. 66).

On July 25, 1946, the Price Control Extension Act of 1946 became law (60 Stat. 664). Pursuant to its authority under that Act, the Price Decontrol Board, on August 22, 1946, authorized the reimposition of maximum selling prices on meat

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on May 7, 1943, to put the meat subsidy program in operation so as to "reimburse [meat packers and wholesalers] for the reduction in ceiling prices". (For text of this May 7, 1943, directive, see Appendix, *infra*, pp. 18-20.)

[4] The Act of June 30, 1945 (59 Stat. 310), which took effect July 1, 1945, transferred to respondent the authority, functions, and property of the Defense Supplies Corporation.

[5] Section 1 of the Act of June 30, 1945 (59 Stat. 306) continued the Emergency Price Control Act of 1942 in effect until June 30, 1946.

products and the reestablishment of the meat subsidy program (11 F.R. 9138). Accordingly, the Price Administrator issued regulations making the various meat price controls effective September 1, 1946 (11 F.R. 9373) and the Director of Economic Stabilization directed respondent to reestablish the meat subsidy program (11 F.R. 9375). Respondent then issued its Regulation No. 10, providing that meat subsidy payments would be made, effective September 1, 1946, in accordance with all the terms and conditions of former Regulation No. 3 (see Appendix, *infra*, pp. 15-16). The restored meat price controls were in effect only through October 14, 1946 (Amendment No. 64, Supplementary Order No. 132, 11 F.R. 12093), on which date price controls were removed, thus automatically terminating meat subsidy Regulation No. 10 (12 F.R. 66).

On March 31, 1947, respondent issued its Announcement No. 1 (see Appendix, *infra*, pp. 16-18), declaring in effect that no subsidies were to be paid with respect to meat held in inventory at the close of business on October 14, 1946, since such meat was sold at uncontrolled prices.[6] Petitioner filed subsidy claims for the period from September 1, 1946, to October 14, 1946, in the aggregate amount of $521,927.83. Payments have been made by respondent in the aggregate amount of

[6] To the extent subsidies allocable to such inventories had already been paid, the Announcement directed their "recapture" subject to certain limitations.

$482,563.92, representing subsidies for meat slaughtered and sold by petitioner during the above period. Petitioner claims an additional $39,363.91 as subsidies due for meat slaughtered during the above period but on hand as inventories at October 14, 1946, and sold on the uncontrolled market after October 14, 1946. Petitioner, on December 11, 1950, filed a protest demanding of respondent subsidy payments for its October 14, 1946 inventory. (R. 6-11.) The protest was denied by respondent on January 2, 1951 (R. 12).

Petitioner then filed its complaint in the Emergency Court of Appeals on January 29, 1951, assailing the validity of Announcement No. 1 and demanding that respondent pay subsidies on its terminal inventory (R. 1-5). Respondent filed a motion to dismiss (R. 13) alleging, *inter alia,* that the only issue presented by the complaint is that of the validity of respondent's Announcement No. 1 under its Regulation No. 10 and that that issue had already been decided in respondent's favor in the substantially identical cases of *Wm. Schluderberg-T. J. Kurdle Co.* v. *Reconstruction Finance Corporation,* 169 F. 2d 419 (E.C.A., 1948), certiorari denied, 335 U. S. 846; *Dixon Packing Co.* v. *Reconstruction Finance Corporation,* E. C. A. No. 470, dismissed pursuant to similar motion on November 13, 1948; and *Grand Rapids Packing Co.* v. *Reconstruction Finance Corporation,* E. C. A. No. 542, dismissed pursuant to similar motion on January

31, 1951. The Emergency Court of Appeals sustained respondent's motion and dismissed the complaint upon the authority of its decision in the *Schluderberg-Kurdle Co.* case. (R. 120).

ARGUMENT

Admittedly, this case presents the same issues as the *Schluderberg-Kurdle Co.* case and is based on an almost identical statement of facts. There, the Emergency Court of Appeals rejected the contentions of the slaughterer and this Court denied certiorari (335 U. S. 846). We submit that the court below, in deciding this case for respondent on the authority of its decision in the *Schluderberg-Kurdle Co.* case, was clearly correct, and that review by this Court is no more warranted here than in that case.[7]

1. Petitioner's major contention is that the *Schluderberg-Kurdle Co.* case was erroneously decided. It is urged that the court below there misconceived the nature and purpose of the subsidy program which, it is contended, was to maintain and stimulate livestock production by means of subsidy benefits passed on to the livestock producer by the slaughterer rather than one of compensation

[7] In addition to the *Schluderberg-Kurdle Co.* case, this Court has already denied certiorari in the five other cases brought to it concerning the meat subsidy program. *Earl C. Gibbs, Inc.* v. *Defense Supplies Corp.*, 329 U.S. 737; *Atlantic Meat Co., Inc.* v. *Reconstruction Finance Corp.*, 329 U.S. 737; *Illinois Packing Co.* v. *Henderson*, 329 U.S. 783, rehearing denied, 329 U.S. 831; *Greenhouse Bros. & Finkelstein, Inc.* v. *Reconstruction Finance Corp.*, 331 U.S. 812; *Samett* v. *Reconstruction Finance Corp.*, 334 U.S. 812.

for meat sold under price control. The court below fell into that error, petitioner asserts, because of an erroneous concession by counsel for *Schluderberg-Kurdle*[8] that the subsidy payments were compensation for the meat sold under price control, thus making the decision in that case turn upon an uncontested issue. These arguments, we submit, are unpersuasive.

The Emergency Court of Appeals had been considering the basic aspects of the meat subsidy program for years prior to the *Schluderberg-Kurdle Co.* case.[9] Respondent fully briefed the nature of the meat subsidy program to the court in detail, citing and discussing the livestock slaughter and production language of the subsidy regulation together with the significance and effect of the Office of Economic Stabilization Directives.

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[8] One of the counsel for Schluderberg-Kurdle Co., it may be noted in passing, was Mr. Wilbur La Roe, Jr., general counsel of the National Independent Meat Packers Association, containing approximately 800 members. Mr. La Roe has had extensive experience in the meat industry in general and in the meat subsidy program in particular, having testified before at least two Congressional committees investigating the subsidy program—on April 1, 1946, before a subcommittee of the Senate Committee on Agriculture and Forestry, on S. Res. 92, and on May 2, 1946, before the Senate Committee on Banking and Currency, which was conducting hearings on S. 2028, a bill to extend the provisions of the Emergency Price Control Act of 1942, as amended.

[9] *Armour & Co.* v. *Bowles*, 148 F. 2d 529 (E.C.A., 1945), certiorari denied, 325 U.S. 871; *Heinz* v. *Bowles*, 149 F. 2d 277 (E.C.A., 1945), certiorari denied, 326 U.S. 719; *Rubin* v. *Bowles*, 150 F. 2d 860 (E.C.A., 1945); *Earl C. Gibbs* v. *Defense Supplies Corporation*, 155 F. 2d 525 (E.C.A., 1946), certiorari denied, 329 U.S. 737; *Federated Meat Corporation* v. *Fleming*, 159 2d 725 (E.C.A., 1947).

Far from being misled by the concession of counsel for Schluderberg-Kurdle Co. as to the basic aspects of the subsidy program, the Emergency Court of Appeals there analyzed in great detail both the history of the program and the tie-in between price control and subsidies. After discussing the pertinent regulations, the court below correctly concluded that the price control provisions emphasize the tie-in between subsidies and maximum prices imposed by law and disclose a Congressional purpose to condition the payment of subsidies upon the continued existence of price controls on the commodity or commodities to be subsidized.[10] Contrary to statement by petitioners, this has been the consistent position of the court both prior and subsequent to the *Schluderberg* case.[11]

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[10] For a discussion of the correctness of the decision of the Emergency Court of Appeals in that case, the Court is respectfully referred to respondent's brief in opposition in *The Wm. Schluderberg-T. J. Kurdle Co.* v. *Reconstruction Finance Corporation*, October Term 1948, No. 248.

[11] Thus, *Rubin* v. *Bowles*, 150 F. 2d 860, 861, states: "Congress in Section 2(e) of the Emergency Price Control Act, 50 U.S.C.A. Appendix, § 902(e), authorized the use of subsidies as an adjunct of the price control program. This policy was reaffirmed by the Act of June 23, 1945 [Public Law 88—79th Congress], which specifically authorized the continuation of meat subsidies." *Earl C. Gibbs* v. *Defense Supplies Corporation*, 155 F. 2d 525, 531 (E.C.A.), holds: "it is hardly accurate to describe the meat subsidies as a gratuity or bounty" but "such subsidies are closely articulated with the price control program." The dissenting opinion in that case stated the purpose of the program even more clearly: "The payment of subsidies to such independents was the course decided upon because it was considered that a rise in maximum prices was a threat to the 'hold the line' policy of the govern-

2. The Price Control Extension Act of 1946, 60 Stat. 664, contained important limitations on the authority of respondent to make subsidy payments. This was recognized and discussed in detail by the Emergency Court of Appeals in the *Schluderberg* case. The Act empowered the Price Control Board "to determine, when maximum prices are in effect with respect to [meat], whether any subsidy or any part thereof in effect prior to June 30, 1946, shall be reestablished in whole or in part." 60 Stat. 668, § 3, 50 U.S.C. App. § 901(e). The Act further stated that such subsidy paying operations "shall not be carried out under authority of this subparagraph (4) with respect to any commodity for any period after the date of the enactment of this Act during which maximum prices on such commodity are not in effect under the Emergency Price Control Act of 1942, as amended, or the Stabilization Act of 1942, as amended * * *." 60 Stat. 671-672, § 6(a) (4), 15 U.S.C.A. § 713 note.

These provisions made it unlawful for respondent to provide subsidy payments on account of meat in a slaughterer's inventory on or after October 15, 1946, when price controls were removed.

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ment, directed toward holding down the cost of living." (P. 532.) *Armour & Co.* v. *Reconstruction Finance Corporation*, 162 F. 2d 918, 922 (E.C.A.), says: "We have also previously pointed out that these subsidies were not mere gratuities or bounties but were closely articulated with the price control program * * *. Under these circumstances we think it is wholly reasonable to condition the receipt of the subsidy upon compliance with the price regulations which the subsidy was thus designed to supplement and support."

The concluding provision of Regulation No. 10 made such payments prohibitory by providing that the Regulation shall terminate automatically "on the failure of any condition required by law as a prerequisite to validity of a subsidy on livestock or meat." Respondent thus had not only a right but a mandatory duty to recapture subsidies paid on inventory on hand when price controls on meat were removed. This policy was consistent with the policy followed at the inception of the subsidy program of permitting slaughterers and packers to dispose of inventory on hand before the price ceilings went into effect.[12]

While it is true, as stated by petitioner, that the court below has refused to read into the subsidy regulation, as "inherent", conditions which it did not find in the regulation and which were repugnant to the express provisions thereof, the statutory provision here involved, as the court below

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[12] In a letter from the Acting Administrator of OPA, George J. Burke, to Senator Joseph C. O'Mahoney, June 7, 1943, read to the Senate by Senator O'Mahoney, the Acting Administrator stated: "Provision has been made in the subsidy program for the protection of meat inventories. While the subsidy is effective for meat slaughtered beginning June 7, the packer's ceiling prices will not be reduced until June 14 for fresh and frozen meat and June 28 for cured and processed meats. This staggering of dates for the price reductions will enable those who have inventories of meat to sell them at the higher prices which now prevail." 89 Cong. Rec. 6495. A similar program of staggering the effective dates on which the price ceilings were to be effective was made when price ceilings on meat were reestablished in September, 1946. Petitioner is demanding not only the higher prices at which he was able to sell his meat on hand when price control was removed on October 15, 1946, but a subsidy as well.

expressly held in the *Schluderberg* case, is an express prohibition which is itself dispositive of the present controversy.

CONCLUSION

The decision below is clearly correct and there is no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
HOLMES BALDRIDGE,
Assistant Attorney General.
PAUL A. SWEENEY,
SIDNEY J. MACHTINGER,
Attorneys.

JULY, 1951.

APPENDIX

1. The pertinent provisions of Section 2(e) of the Emergency Price Control Act of 1942, as amended (56 Stat. 23, 765; 58 Stat. 632; 59 Stat. 306; 60 Stat. 664; 50 U.S.C. App. 902(e)), provide as follows:

> Whenever the Administrator determines that the maximum necessary production of any commodity is not being obtained or may not be obtained during the ensuing year, he may, on behalf of the United States, without regard to the provisions of law requiring competitive bidding, buy or sell at public or private sale, or store or use, such commodity in such quantities and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof or otherwise to supply the demand therefor, or make subsidy payments to domestic producers of such commodity in such amounts and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof: *Provided,* That in the case of any commodity which has heretofore or may hereafter be defined as a strategic or critical material by the President pursuant to section 5d of the Reconstruction Finance Corporation Act, as amended, such determinations shall be made by the Federal Loan Administrator, with the approval of the President, and, notwithstanding any other provision of this Act or of any existing law, such commodity may be bought or sold, or stored or used, and such

subsidy payments to domestic producers thereof may be paid, only by corporations created or organized pursuant to such section 5d * * *.

2. The pertinent provisions of Section 6(a)(4) of the Price Control Extension Act of 1946 (60 Stat. 664, 671) provide as follows:

> Sec. 6 (a) The last paragraph of section 2 (e) of the Emergency Price Control Act of 1942, as amended by the Stabilization Extension Act of 1944, shall not apply with respect to operations for the fiscal year ending June 30, 1947, of the Commodity Credit Corporation and the Reconstruction Finance Corporation: *Provided,* That with respect to such corporations and such operations, the making of subsidy payments and buying for resale at a loss shall be limited as follows:
>
> Payments and purchases may be made with respect to operations for the fiscal year ending June 30, 1947, which involve subsidies and anticipated losses as follows:
>
> (4) With respect to noncrop programs, 1946 crop program operations and the 1947 crop program operations relating to sugar, flour, petroleum, petroleum products, and other domestic and imported materials and commodities, $869,000,000: *Provided,* That the operations authorized under this subparagraph (4) shall be progressively reduced, shall be terminated not later than April 1, 1947, and shall not cost more than $629,000,000 during the last

six months of the calendar year 1946. Operations shall not be carried out under authority of this subparagraph (4) with respect to any commodity for any period occurring after the date of the enactment of this Act during which maximum prices on such commodity are not in effect under the Emergency Price Control Act of 1942, as amended, or the Stabilization Act of 1942, as amended: *Provided,* That subsidies with respect to petroleum produced from stripper wells shall be continued at not to exceed the existing rates. No subsidy or purchase and sale operation shall be undertaken under authority of this subparagraph (4) with respect to any commodity unless a subsidy or purchase and sale operation with respect to such commodity was in effect on June 29, 1946; and no such operation shall be undertaken under authority of this subparagraph (4) which will increase the rate of subsidy paid or the rate of loss incurred with respect to any commodity above that which would be paid or incurred if the operations in effect on June 29, 1946, had been continued on the same basis.

3. Regulation No. 10, Reconstruction Finance Corporation, provides:

Section 7010.1. Reconstruction Finance Corporation shall make payments to eligible slaughterers on cattle, calves, hogs and pigs slaughtered on and after September 1, 1946, in accordance with all the terms and conditions of Livestock Slaughter Payments, Revised Regulation No. 3 of Reconstruction Finance

Corporation, as amended by Amendments No. 3, 4, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18.

Section 7010.2. Revised Regulation No. 3 of Reconstruction Finance Corporation and Amendments No. 3, 4, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 thereto are made a part of this regulation.

Section 7010.3. This regulation shall terminate automatically, without regard to the ten day notice provision of Section 7003.12 of Revised Regulation No. 3, on the failure of any condition required by law as a prerequisite to validity of a subsidy on livestock or meat.

This regulation shall become effective September 1, 1946. Issued this 28th day of August, 1946.

STUART K. BARNES,
Executive Director,
Office of Defense Supplies.

4. Announcement No. 1 Under Regulation No. 10 of Reconstruction Finance Corporation provides:

The volume of meat held in inventories by slaughterers at the close of business on October 14, 1946 (the date of termination of price controls on meat) was substantial, and such inventories were, of course, sold thereafter at uncontrolled prices. The Office of Temporary Controls has determined that in view of the provisions of Section 6(a)(4) of the Price Control Extension Act of 1946 and in order to avoid unjust enrichment of packers at the expense of the Government, subsidies allocable

to these inventories should be recaptured. Operation of the plan is as follows:

I. De Minimis Cases. Because of the disportionate administrative burden in relation to the potential amounts involved, the Government will not attempt to recapture such subsidies in the case of slaughterers who furnish information to the RFC showing that they did not slaughter in excess of 500,000 pounds total live weight of cattle, calves and hogs combined during the period consisting of the May, June and September 1946 accounting periods. A form for the use of slaughterers falling in this class is attached hereto (RFC Form No. DSC 117). Such slaughterers must complete and file this form with RFC before April 30, 1947, unless they elect to have invalidated their September and October 1946 meat subsidy claims whether paid or unpaid. On receipt of the completed form showing slaughter of not more than a total of 500,000 pounds live weight of cattle, calves and hogs combined during the period consisting of the May, June and September 1946 accounting periods, RFC will pay any amounts otherwise due on the September and October 1946 claims.

II. Large Slaughters. With respect to slaughterers who slaughtered in excess of 500,000 pounds during the May-June-September period the amount to be recaptured will be based on the amount of meat held in inventory at the close of business October 14, 1946, unless they elect to settle instead by foregoing their total subsidies for September and Octo-

ber 1946. A form to be used by such slaughterers in reporting their inventories or for the purpose of making this election will be furnished as soon as copies are available. Until the form is available, no further September and October subsidy payments can be made to any slaughterer in this category unless he had no inventory of meat or meat products at the close of business October 14, 1946.

With respect to all slaughterers, large or small, who have already received the September-October subsidy, if their cases are not settled pursuant to the procedures provided herein, they will be referred to the Department of Justice.

Issued this 31st day of March, 1947.

STUART K. BARNES,
Executive Director,
Office of Defense Supplies.

5. COPY

THE SECRETARY OF COMMERCE

Washington

May 7, 1943.

DEAR MR. MULLIGAN:

The Price Administrator has issued instructions reducing the ceiling prices on beef, veal, pork, lamb, mutton, coffee, and butter by approximately 10%. I am advised that this action was taken with the full approval of the Director of Economic Stabilization.

I have received a letter from the Director of

Economic Stabilization stating that this reduction in ceiling prices will substantially decrease the production of the commodities referred to above unless the Government pays to packers and wholesalers the amounts by which the ceiling prices have been reduced. An estimate of the aggregate amount of money necessary to make these payments for a year is $450,000,000.

The Director of Economic Stabilization, pursuant to Executive Order No. 9250, has directed me to cause one of the corporations organized under Section 5d of the Reconstruction Finance Corporation Act, as amended, to make payments to packers and wholesalers of these commodities in such manner as will reimburse them for the reduction in ceiling prices. I therefore make the following findings pursuant to Section 2(e) of the Emergency Price Control Act of 1942:

1. The maximum necessary production of beef, veal, pork, lamb, mutton, coffee, and butter may not be obtained during the ensuing year unless subsidies are paid to packers and wholesalers of these commodities.

2. It is necessary in order to assure the maximum necessary production for Defense Supplies Corporation to subsidize the packers and wholesalers in such amounts as may from time to time be determined by me to be necessary to reimburse them for the reduction in ceiling prices.

Will you please request Defense Supplies Corporation to take the necessary action to put this into effect.

Sincerely yours,

(S.) JESSE H. JONES,
Secretary of Commerce.

MR. H. A. MULLIGAN,
President,
Defense Supplies Corporation,
Washington, D. C.

I Approve:

(S.) FDR.

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